FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA, *Petitioner,*

v.

UNITED STATES GYPSUM COMPANY, ET AL., *Respondents.*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS COLON BROWN AND J. P. NICELY

CLARK M. CLIFFORD
CARSON M. GLASS
THOMAS RICHARD SPRADLIN
BARRY J. ISRAEL
CLIFFORD, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
(202) 298-8686

Counsel for:

COLON BROWN AND J. P. NICELY

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether fundamental fairness and the Due Process Clause were violated when the court below effectively gave erroneously retroactive application to a changed rule of law about which Respondents had no prior notice.

2. Whether the failure of the Petitioner to introduce any evidence at trial connecting Respondents Brown and Nicely with participation either prior to or during the statutory period in a conspiracy charged under 15 U.S.C. § 1 permits a retrial of these Respondents.

STATEMENT OF THE CASE

Respondents Brown and Nicely adopt by reference the Statement of the Case included in Respondents' Joint Brief filed in this case.

SUMMARY

1. In the face of a half century of precedent to the contrary, the Government has argued as the trial court below ruled that price verification (with which both Colon Brown and J. P. Nicely had no direct involvement prior to the statutory period and none thereafter) amounts to price fixing under the Sherman Act, regardless of lawful purpose of such verification, if there is a stabilizing effect on prices. If this position were upheld, it would require the retroactive application of an unforeseen, judicially expanded rule of law in violation of Messrs. Brown and Nicely's constitutional rights and principles of fundamental fairness. The Court of Appeals for the Third Circuit, although it correctly held that Respondents were unfairly convicted under an erroneous instruction precluding jury consideration of lawful purpose for the limited verification which did occur, nonetheless remanded Messrs. Brown and Nicely for a new trial based on yet another unforeseen rule of law different from that applied by the trial court or any other court. This new definition of the offense charged, like that applied by the trial court, if applied retroactively would have severe constitutional implications concerning a defendant's right to adequate notice.

2. The prejudice which would result if this Court were to permit retroactive application of a changed rule of law is of particular concern for Messrs. Brown and Nicely, against whom no meaningful evidence was

presented concerning participation in the conspiracy charged. The paltry amount of purported "evidence" which was offered was for the period prior to the running of the statute of limitations with no evidence presented connecting them to a conspiracy continuing into the statutory period.

This dearth of evidence was particularly evident in the Government's case on verification. There was no evidence introduced that Colon Brown or J. P. Nicely did anything or knew anything that could render them legally culpable on this issue.

Finally, J. P. Nicely, unlike any of the other several appellants to the Third Circuit Court of Appeals, did not seek the alternative of a new trial. Instead, Mr. Nicely chose to base his appeal on the single compelling fact that, after four months of trial, it was painfully obvious that he had been mistakenly indicted and thus was entitled to acquittal. There was no evidence offered of his participation in the conspiracy charged. Without explanation, however, the Third Circuit ignored his clear request that he not be considered for any relief other than acquittal, and the Circuit Court reversed and remanded his case along with that of the other appellants for a new trial. Since it was this relief which the Government challenged on the Writ of Certiorari granted by this Court and not the pending Petition of J. P. Nicely (No. 76-1556), this review just like that in the appellate court below cannot result in a retrial without violating the double jeopardy bar of the Fifth Amendment.

ARGUMENT

I. Retroactive Application of a Changed Rule of Law Violates Fundamental Fairness and the Due Process Clause.

When an established rule of law or criminal statute is judicially enlarged, it should not be applied retroactively. Certainly, where persons have acted in reliance on the teachings of prior judicial interpretations and on the advice of their counsel based on these decisions, it would shock the conscience to hold that such conduct occurring prior to a judicial enlargement of the law could be the basis for criminal convictions. (See Respondents' Joint Brief, Section II, at p. 50, *et seq.*, and cases cited therein.)

Such a retroactive application of a changed rule of law regarding price verification is precisely what these two individuals have faced throughout the course of this litigation and now must face again before this Court.

Price verification was employed by the Respondent corporations in an attempt to learn whether a customer had truly received a lower price offer from a competitor. The purpose of the price information exchange was to comply with the Robinson-Patman Act (under that Act's "meeting competition" clause, 15 U.S.C. § 13(b)).[1] In those instances when confirmation could not be obtained in other ways, an employee of one gypsum board manufacturer would occasionally telephone a competitor to verify the price at which the competitor was offering gypsum board to a specific

[1] Apart from whatever rule of law is established concerning price verification, neither Respondents Brown nor Nicely had anything more than tangential involvement with it prior to the statutory period and none thereafter.

customer who had claimed that this lower price was available. Virtually every witness who testified during the trial about the purposes of verification established overwhelmingly that those purposes were protection from buyer fraud, Robinson-Patman Act compliance, or both. Moreover, National Gypsum Company had a compilation of legal guidelines cleared by outside counsel which specifically approved of checking claims of lower prices with competitors to verify a competitive situation which would justify, under the Robinson-Patman Act, meeting a lower competitive price or more favorable terms.[1] (DX(NG)-77, V-A. 2821-2834). This policy was based upon prior decisions of this Court which approved of such exchanges among competitors under certain "controlling circumstances." In *Maple Fooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925), the Sherman Act was held to permit the exchange of average cost data, despite an apparent stabilizing effect on prices, where no intent to constrain individual competitive activity was found. Further, the Court in *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925) approved the exchange of specific price information

[1] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), permits a *prima facie* showing of price discrimination to be rebutted or justified by the seller—

> "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The Act emphasizes, however, that:

> "*the burden of rebutting* the prima-facie case thus made by showing justification *shall be upon the person charged* with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. . . ." (Emphasis added).

concerning specific customers, despite a possible effect on prices, where the purpose of the dissemination was to prevent buyers from defrauding sellers. (See Respondents' Joint Brief, at p. 24).

In mid-January 1969, after this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969),[3] National decided, as a matter of company policy and on the advice of outside legal counsel, to discontinue further verification calls to competitors. The decision was made because *Container* cast at least some doubt on whether any verification of claimed competitive discounts could continue.

National apparently exercised good judgment in terminating their limited use of price verification. Some confusion did exist, particularly with the trial court below. Notwithstanding the consistent finding by other Federal courts that verification by competitors of customers' claims for more favorable competitive offers does not violate the Sherman Act when done for the purpose of complying with the Robinson-Patman Act or to protect against customer fraud,[4] the trial court below believed that the *Container* decision in 1969 had changed the law of *Cement Manufacturers.* It was the trial court's position that *Container* prohibited even good faith verification for Robinson-

[3] Importantly, *Container* was filed as a *civil* injunction suit, *not* a criminal prosecution. This fact reinforces the inherent unfairness of retroactive application, in this *criminal* case, of the drastic change which the trial judge believed *Container* had effected.

[4] *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); *Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Webster* v. *Sinclair Refinishing Co.*, 338 F.Supp. 248 (S.D.Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*, 326 F.Supp. 295 (N.D.Cal. 1971).

Patman purposes, at least where such verification might have had a stabilizing effect on prices.

The Government supports the trial court's ruling and contends that this reading of *Container* as outlawing price verification regardless of lawful purpose is not inconsistent with prior law and therefore can be applied retroactively. The basis of the Government's position is its erroneous argument that the price exchanges held lawful in *Maple Flooring Manufacturers Association* and *Cement Manufacturers, supra,* had no tendency to suppress competition. On the contrary, this Court specifically recognized in *Cement* that the exchanges "tended to produce uniformity in price." (268 U.S. at 593). *Cement* extended *Maple Flooring,* which also allowed price information exchanges, by holding that reciprocal communications between competitors of the prices at which cement was sold under "specific job contracts" were permissible under the Sherman Act even where they related to specifically identified jobs and customers. Such exchanges were approved, despite an express finding that they tended to produce uniformity in price, because their purpose was to protect against buyer fraud. (268 U.S. at 603-04). Since both *Cement* and *Maple Flooring* involved price exchanges which had a stabilizing effect on prices, to read *Container* as outlawing such exchanges in the face of proof of lawful purpose would create a new rule of law which cannot be applied retroactively.

Both Respondents National Gypsum and Andrew Watt submitted requests (which under the procedures established for the multi-party trial accrued to all defendants' benefit) for an instruction that, under the trial court's interpretation of *Container,* the jury could not consider pre-*Container* verification for Robinson-

Patman purposes to be evidence of unlawful conduct. (National's Supp. Request Regarding Retroactivity of Intervening Change of Law, IV-A. 1901). The court refused to give the requested instruction and thus refused to permit the jury to consider the issue of purpose. Rather it instructed the jury that if they found verification to have had a stabilizing effect on prices, then whether or not the purpose of verification was to comply with the Robinson-Patman Act was irrelevant. The Court of Appeals below held that this instruction constituted reversible error.[5]

Certainly under the trial court's unique and previously unsupported reading of *Container,* it was error not to give the requested non-retroactivity instruction. This refusal was prejudicial especially to these two individual Respondents who had little or no connection with National's occasional use of price verification

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[5] The trial judge charged:

"If you decide that, if you decide this [verification] was *merely done* in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, *standing alone*, as establishing an agrement to fix, raise, maintain, and stabilize prices, as charged.

"However, if you decide that the *effect* of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices.

• • •

". . . If the *effect* of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act *regardless of the specific purpose* that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense." (Emphasis supplied).

prior to the statutory period and absolutely none thereafter.[6]

Although the Third Circuit Court of Appeals found error in the trial court's instruction on verification, agreeing with appellants that the existing rule of law precluded conviction for a Sherman Act violation when "controlling circumstances" existed, it in reality established yet another new rule of law by which appellants were to be judged. This new rule, although not as restrictive as that which the Government and the trial court below would have this Court apply, is a far broader standard than any existing prior to *Container.* The new requirement which the Circuit Court would have applied to Respondents on remand includes a four-part test—a test not in existence or even suggested during the time covered by the indictment. In order to qualify verification for Robinson-Patman Act purposes as a "controlling circumstance," the Circuit Court would require that appellants prove: (1) a sole purpose to comply with the Robinson-Patman Act; (2) prior unsuccessful resort to all other reasonable means of corroboration; (3) existence of a good and independent reason to doubt the buyer's truthfulness; (4) and that communications with competitors were strictly limited to one price and one buyer. *United States Gypsum Co.* v. *United States,* 550 F.2d 115, 126 (3rd Cir. 1977).

As noted in the Respondents' Joint Brief, (at pp. 48-49) applying these four factors retroactively, none

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[6] Importantly, National discontinued verification as a result of questions raised by the *Container* case only days after the statutory period began. There is no evidence of any connection between these Respondents and verification after *Container* was decided.

of which were ever suggested to be critical prior to the Third Circuit's decision, shifts the burden of proof from the prosecution to the defense and would deprive these two Respondents, Messrs. Brown and Nicely, of fair warning as required by due process and fundamental fairness. Indeed, the Third Circuit acknowledged that its newly stated rule was a narrowing of the "controlling circumstance" defense. 550 F.2d at 126. Such an unanticipated judicial enlargement of an established rule of law applied retroactively as the Third Circuit proposed violates Due Process and fundamental fairness.

The fundamental unfairness of applying a broad reading of *Container* to pre-*Container* conduct is particularly detrimental to Colon Brown and J. P. Nicely. As will be discussed in Part II of this brief, neither of them were ever shown to have made or received a verification call or to have participated in any meaningful way in approving such calls. More importantly, National ceased verifying almost immediately after the *Container* decision because of questions raised concerning the impact *Container* might have on verification. These two facts are particularly important when considered in light of the prosecution's decision to postpone grand jury proceedings against all the defendants in April of 1968 in the hope that "[a] favorable decision by the Supreme Court in the *Container* case may provide a convenient approach to the gypsum problem." (DX Q-13). Further, the Director of Operations of the Antitrust Division approved filing the indictment against the individuals even though he recognized that the evidence against them fell short of identifying specific affirmative acts in furtherance of the alleged conspiracy in the statutory period. (DX

Q-39). The beginning of the statutory period, of course, coincided with the decision in the *Container* case. Thus, Respondents Brown and Nicely would be severely prejudiced by applying a rule about which they had no notice to activities preceding the decision which in the Government's opinion changed the standard of liability.

As this Court held in *Marks* v. *United States*, 430 U.S. 188 at 191 (1977) "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties . . . is fundamental to our concept of constitutional liberty."

II. The Failure of the Petitioner to Introduce Any Evidence at Trial Connecting Colon Brown or J. P. Nicely With Participation Either Prior to or During the Statutory Period in the Conspiracy Charged Prohibits a Retrial.

Intertwined with questions surrounding the narrow legal issue of the propriety of price verification and the question of what rule is to be applied to the conduct at issue is the fundamental question of whether any evidence exists to show that either Colon Brown or J. P. Nicely participated in any way in a conspiracy to violate the antitrust laws through price verification or any other means or device. This question is deserving of attention by this Court since a reversal of the Third Circuit's decision could result in a reinstatement of the guilty verdicts against Colon Brown and J. P. Nicely or alternatively in a retrial based on a changed rule of law.[7] This should not be the result of whatever action this Court takes.

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[7] As discussed below, Mr. Nicely may not be retried since this is relief he has never requested.

As a matter of law, both Mr. Nicely and Mr. Brown were entitled to be judged solely on the evidence applicable to them. (See *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947); *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Marchiso*, 344 F.2d 653, 666 (2d Cir. 1965)). As to each defendant in a criminal conspiracy trial, the Constitution and laws of the United States require that the evidence be considered separately to determine first if the alleged conspiracy existed and, if so, whether each defendant was a knowing participant. Here, whatever might be concluded with respect to others involved in the trial, there is nothing whatsoever to show that either Colon Brown or J. P. Nicely participated in any conspiracy of any kind. Under established principles of law, as embodied in Rule 29 of the Federal Rules of Criminal Procedure, these two individuals should not be retried on these charges no matter what legal standard is applied to the activities challenged. Indeed the question of the sufficiency of the evidence in this case is one with constitutional dimensions. Let it be clear, however, that Messrs. Brown and Nicely do not come to this Court arguing mere error in the jury's verdict. Rather, the purpose of this Supplemental Brief is to call the Court's attention to the unavoidable conclusion that the charges filed against Colon Brown and J. P. Nicely are so devoid of evidentiary support as to render their conviction unconstitutional. As in *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), the "decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." As to Colon Brown and J. P. Nicely, it does not.

Although the indictment charged a multifarious thirteen-year conspiracy to fix prices, credit terms, and

packaging methods for gypsum wallboard, the case attempted against these two individuals involved only a stale, disputed and casual conversation in 1962, a 1965 price increase which terminated eighteen months prior to the statutory period, a 1966 change in credit terms which was also substantially modified prior to the statutory period, and the question of price verification which, as noted in the Opinion of Judge Hunter below, was the point on which the Government's case centered. (550 F.2d at 120).

Irrespective of the focus of the Government's case at trial, the only so-called "evidence" presented against these two individuals related to the period prior to December 27, 1968, which is the day the relevant statutory period began to run. Judge Hunter observed that "over a period of five months, the Government introduced masses of evidence concerning a multitude of seemingly unrelated events and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing of gypsum wallboard. . . . *Most of this evidence* dealt with actions prior to the start of the applicable limitation period." (*Id.* at 127). Moreover, this mass of seemingly unrelated events was at variance with the indictment which charged a single, uniform conspiracy to fix prices. Judge Hunter was troubled by this aspect of the case and held that a better instruction on the "scope and purpose" of the alleged conspiracy was necessary. In particular, Judge Hunter noted that, although Colon Brown had been convicted of the single conspiracy charged, he had only been connected by the evidence to two pre-statutory period incidents—the 1965 price increase and the 1966 credit change. Judge Hunter concluded that "it does not follow [that the alleged participation] . . . means

that he associated himself with an overall conspiracy to stabilize prices beginning before 1960 and lasting until 1973." (550 F.2d at 128).

Clearly, none of the pre-statutory period evidence related to any proven agreement which even if actually in existence prior to the statutory period extended into it.

Perhaps the most persuasive evidence that neither of these two individual Respondents was in any way connected with an actionable price-fixing conspiracy is found in the Government's own documents. For instance, a pleading signed by the chief prosecutor and filed with the trial court was represented as showing "Price-fixing Discussions Within the Statutory Period." Neither that document nor a supplement to it mentioned the name of either Colon Brown or J. P. Nicely. (Docket No. 240 filed May 8, 1975, Vol. I-A 19). Similarly, when the Director of Operations of the Antitrust Division finally approved the filing of the indictment against the individuals, he did so even though he recognized that the "evidence" with respect to the proposed individual defendants fell short of identifying specific affirmative acts in furtherance of the alleged conspiracy within the statutory period. (DX Q-39).

The Brief of the Government to this Court also highlights the paucity and staleness of the evidence. In the statement of the case describing the several unconnected and allegedly conspiratorial episodes, it is not unreasonable to expect that in laying out its factual assertions the Government would place before the Court its most probative evidence. Yet when the Brief is reviewed, there are only two minor references to

J. P. Nicely—one concerning a 1962 sales call in Texas and the other a comment on testimony concerning his understanding of the 1965 price increase. There is no link to a single conspiracy. The few references to Colon Brown are equally innocuous. Four purport to deal with the 1965 price increase although two of these by the Government's own admission relate to conferences Respondent Brown held with USG's president in a court-directed effort to settle outstanding Federal patent litigation. Two other references concern the 1966 change in credit terms. Neither of these changes extended into the statutory period. The only other mention of Colon Brown is a statement that he knew about verification in the 1966-67 period. National Gypsum, of course, ceased verifying in January of 1969 as a result of questions raised by counsel concerning the *Container* decision.

As the Government has conceded, the Court has the authority to pass on the issues raised in this supplemental brief even though falling outside those on which the Writ of Certiorari was granted. (See Brief for the United States, at p.72 n.68). It should do so because a reinstatement of the verdict based on the verification issue would not remedy the grave constitutional issue present. Moreover, consideration of these issues can lead to an alteration of the judgment of the Third Circuit. Supreme Court Rule 40(1)(d)(2) provides that "the court, as its option, may notice a plain error not presented." Thus, the Court may take notice of these questions and direct such relief as it considers appropriate under the circumstances.

A. COLON BROWN

The single, most compelling statement existing in the record of this case to date concerning Colon Brown's potential involvement in the price-fixing conspiracy charged is that made in Judge Hunter's opinion in the Court of Appeals below. In discussing his concern over the deficient charge given by the trial court on the purpose and scope of the alleged conspiracy, Judge Hunter found "the only actions with which any evidence connected him (Brown)" were the 1965 price increase and the 1966 change in credit terms. (550 F.2d at 128). The significance of this conclusion is great.

On the one hand, it is reasonable to assume that Judge Hunter, who earlier in the opinion had recognized that "[t]he Government's case on price fixing centered on . . . verification," (*Id.* at 120) would have included in his statement on Colon Brown a connection to verification if he had found one in existence. He did not, however, because there was no such connection. No witness ever testified nor did any document show that Colon Brown engaged in or ordered verification calls or that he discussed their use with any competitor.

The record does show, without question, that verification had first taken place long before Colon Brown became National's Chairman or had anything to do with the entire company's pricing procedures. In the four years after he became Chairman and before National ceased verifying at the beginning of the statutory period, there is nothing in the record which shows that Respondent Brown ever made, requested, or ordered a verification call to a competitor. Nothing in the record establishes that he in any way supervised such calls or had any knowledge of their extent.

Colon Brown's sworn testimony was that he had nothing to do with competitive price verification and that he did not even learn of its existence until 1968 shortly before the practice was discontinued by the National Gypsum Company. (III-A. 1586-1588). This testimony was never challenged. The Government in its Brief (at p. 38) makes a half-hearted attempt to connect Colon Brown to verification by citing the testimony of a National employee, Kenneth Atwell, who stated that he verified in 1966-1967. He did not do this on Colon Brown's orders, however. The clear import of his testimony is that he verified in the hope that the information he received would convince others to terminate the decision not to meet competition—hardly a conspiratorial purpose. Moreover, Atwell testified he did not recall ever having had discussions with Colon Brown. (III-A. 609). Mr. Atwell, the National official responsible for verification calls, received verification authority from Mr. John Brown long before Colon Brown became Chairman of the Board. (III-A. 608). Nor is there proof of any kind that Colon Brown even knew what, if anything, other gypsum wallboard producers did with respect to verification of customers reports of competitive pricing.

Finally, the record shows that company policy required cessation of price verification with competitors in January of 1969. (III-A. 639). There is no evidence that Colon Brown knew of a single verification call by National Gypsum Company thereafter or, indeed, at any time within the statutory period. The unimportance of verification to Colon Brown is obvious from the evidence that in December of 1969 his assistants were unsure that he even knew that these calls had been stopped in January of that year. (III-A.

640-41). This total absence of evidence should be considered by the Court when reviewing the verification issue. Clearly this issue is the focus of the Government's case. If there is to be a retrial or a reinstatement of the verdicts, Colon Brown cannot fairly be included.

In addition to its futile attempt to link Colon Brown to a conspiracy based on price verification, the Government in its Brief to this Court and during the case below has sought to link Respondent Brown to what it calls "subsidiary agreements." In its Brief the Government lists a number of such agreements which really only highlight the disjointed, episodic, and, most importantly, stale character of its case.

Importantly, no adequate effort was ever made to link these so-called "subsidiary agreements" to the overall price-fixing conspiracy charged other than through the argument that price verification was the connecting mechanism. Since Colon Brown had no connection with price verification, there was no way for him to join a single conspiracy. Thus, the failure of the trial judge to instruct the jury on the issue of single versus multiple conspiracies when the evidence raises this issue is clear error. (*United States* v. *Varelli*, 407 F.2d 735, 736 (7th Cir. 1969)).

In reality the Government attempts to link Respondent Brown to only two of the claimed subsidiary agreements. The first of these involves National's independent decision to follow United States Gypsum's lead in increasing list prices of gypsum wallboard. The central theme in the prosecution's case against Colon Brown involved some meetings and telephone contacts between him and officials of the United States Gypsum

Company. But no evidence of any kind was introduced to show that these ever involved discussions of gypsum wallboard pricing.

What the Government cavalierly disregards is that the reason the assertedly conspiratorial meetings were held was an effort by Respondent Brown, newly elected as National's Chairman of the Board, to settle long-standing patent disputes between National and USG. That this was the sole purpose of these meetings was proven by the unimpeached testimony of Colon Brown, contemporary documents, and the chronological relationships between these meetings and developments in the patent infringement cases. (III-A. 1565-77; VI-A. 3329, 81, 92).[8] Unable to counter the clear and unchallenged explanation for the purpose of these meetings, the Government pressed its case arguing that because Colon Brown *could* have engaged in conspiratorial discussion with USG officials, he *must* be deemed to have done so. However, no slightest evidence was produced by the Government to challenge Colon Brown's testimony on this issue. There can, of course, be no question that National Gypsum Company was then being sued by USG for alleged patent violations. The contemporary court records were introduced and

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[8] Similarly, there is nothing in the record to prove that Respondent Brown's comment in a letter to Morgan of UGS about "other subjects of mutual interest" was a harbinger of price discussions. On both direct and cross examination, Colon Brown stated that these "other matters" related to Canadian operations of the two companies. USG had requested documents from National to be used by USG in litigation with the United States Government concerning export of gypsum rock from Canada. Also current was a possible revision in Canadian tax law that court affect both companies. (III-A. 1576.)

are unassailable. They show that Federal Judge Robson, hearing two of the patent suits, was persuaded to grant a time extension to September 17, 1965, because top executives of both companies were in the process of discussing settlement. Judge Robson described this as "welcome news." (VI-A. 3362, III-A. 1571).

But in the face of this clear and unchallenged evidence of the purpose and content of these meetings, the prosecutors continued to press for the conviction of Colon Brown on the previously stated ground that because he *could* have talked with USG officials about wallboard pricing, he *must* be found to have engaged in such illegal discussions. There is no evidence of any kind to support this prosecutorial surmise. Instead of evidence, the prosecutor relied on the aspersion that the jury should convict Colon Brown of fixing prices because there was too much at stake for him not to do so and, by hypothesis, that any reasonable businessman would have done so in his place.

What was consistently ignored by the prosecution in its effort to create a case against Colon Brown based on stale evidence of the 1965 price increase is that in May of 1967 Colon Brown personally directed that there be a $2 per square foot price decrease on one-half inch gypsum wallboard. (III-A. 1589-1592). This independent and bold action was an effort by Colon Brown to maintain National's competitive position even though it was expected to cause as much as an 8% reduction in profits. (III-A. 1591). Clearly, if Colon Brown had participated in a conspiracy in 1965 (which he did not) fully three years prior to the beginning of the statutory period, the nationwide price decrease eighteen months later would have served adequate notice that any alleged agreement was at an end.

Where a conspiracy is alleged, each defendant who has completely disassociated himself from the conspiracy through some affirmative action prior to the commencement of the limitations period is entitled to acquittal. (*Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946); and *Local 167* v. *United States*, 291 U.S. 293, 298 (1934)). Withdrawal is accomplished by the "communication of the abandonment in a manner reasonable calculated to reach co-conspirators," *United States* v. *Borelli*, 336 F.2d 376, 388 (2nd Cir. 1964), *cert. denied.*, 379 U.S. 960 (1965). Surely, as discussed in Respondents' Joint Brief, p. 58 *et seq.* resumption of competitive activity constitutes adequate notice.

The only other so-called "subsidiary agreement" in which Mr. Brown was to have participated was the change in credit terms adopted by National in March of 1966 when the company again followed the lead of USG. This, too, presents no probative evidence of guilt as to Respondent Brown. In any event, during the months and years thereafter, wide variations occurred in credit terms on gypsum wallboard. Thus, like this 1965 price increase, this change did not continue into the statutory period. Colon Brown's interest in the general subject of credit terms was superficial at best and was generated by an internal company memorandum written on August 7, 1965, by a subordinate employee concerned with production schedules in the plants. The memorandum was written long before the March 1966 credit change, and pointed out that National's credit policies encouraged customers to defer orders until late in the month so as to obtain extended payment terms, thereby creating problems with plant production schedules. (II-A. 762; III-A. 1583-85).

As a result of that memorandum in August 1965, Colon Brown, who had recently become Chairman of the Board and Chief Executive Officer of National, ordered "an objective analysis' of the problem and stated, "If this is costing profits, then let's act." (App. 894ex; III-A. 1585). Over the following several months a number of alternatives were considered. USG's credit change announced in January 1966 to become effective March 1 bore little resemblance to the various credit plans which National had been considering. National, however, in the exercise of its own business judgment and in order to remain competitive followed USG's lead by announcing its credit change on February 1.

No evidence exists to show that Colon Brown discussed National's change in credit terms with representatives of any other gypsum producers. There is absolutely no evidence that he had any advance knowledge of USG's plans. The Government relies primarily on an ambiguous entry in Colon Brown's desk calendar for the assertion that he met with a Mr. Fredericks of Georgia Pacific, during which meeting he must have discussed a credit change. Mr. Fredericks, under direct examination by the prosecutor, remembered no such meeting.

Thus, there is no evidence to support a guilty verdict against Colon Brown. The Government has failed to present evidence sufficient to prove the existence of any conspiracy to fix gypsum wallboard prices. What little evidence was offered of a claimed conspiracy relevant to Colon Brown was all for a time prior to the statutory period. Even these bits and pieces are unworthy of consideration since events subsequent to them but prior to

the statutory period modified whatever impact there might have been.*

Respondent Brown respectfully requests that this Court take notice of this failure of proof and consider it in rendering a decision.

B. J. P. NICELY

When J. P. Nicely filed his appeal with the Third Circuit, he sought only acquittal challenging the sufficiency of the evidence. Although he concurred in the position of the other appellants that numerous reversible errors occurred during the trial, he did not seek the alternative relief of a new trial. This was stated both in his own brief to the Circuit Court and in the "Appellants Joint Brief." Nevertheless the Third Circuit somehow ignored the lone basis for his appeal and joined Mr. Nicely with all other appellants when it reversed and remanded for a new trial. It was from this reversal that the Government petitioned this Court for a Writ of Certiorari.

Mr. Nicely also filed a petition with this Court requesting that the relief he sought at the appellate level be granted by the Supreme Court. This petition (No. 76-1556) is still pending disposition by the Court. Therefore, J. P. Nicely finds himself before this Court in the awkward position of having to respond after

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* That the Government has relied on stale evidence with no connection to the statutory period is underscored by Judge Zirpoli's finding in *Wall Products Co.* v. *National Gypsum Co., et al.*, 326 F.Supp. 295, 328 (N.D.Cal. 1971), the civil suit filed only against corporate defendants and which led to these criminal indictments. It was Judge Zirpoli's finding that "by January 1, 1968 all defendants had abandoned and withdrawn from the conspiracy."

having been included when he should have been separated. He should not be a respondent in this case.

Because Mr. Nicely did not seek the remedy of a new trial he submits that he cannot be required to undertake a second defense, for to do so would violate the Double Jeopardy Clause of the Fifth Amendment. This basic constitutional right prohibits more than one criminal prosecution for the same offense. It provides three related protections.

> "It protects against a second prosecution for the same offense after acquittal. *It protects against a second prosecution for the same offense after conviction.* And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717 (1969); *United States* v. *Wilson,* 420 U.S. 332, 343 (1975).

There can be no doubt that J. P. Nicely has been placed in prior jeopardy as a result of the trial below. The Third Circuit's decision as to him should be of no effect since he did not seek a reversal for retrial purposes. His seeking only acquittal on sufficiency of evidence grounds required that either this particular relief be granted or his original verdict be left to stand.

Thus, when this Court considers the disposition of this case, it should render judgment in a way that Mr. Nicely's constitutional rights are protected. He does not seek a retrial. He should not be a respondent in this case. He files this brief not to join with the other Respondents but to protect and emphasize his separation. His purpose is only that he be vindicated by a declaration that there was no evidence of his guilt.

A travesty of justice is the only way to describe the case the Government has attempted to make showing

Mr. Nicely's role in the alleged conspiracy. The only suggestion in the Brief for the United States that Mr. Nicely may have been involved in the conspiracy charged is a reference to a sales call in March, 1962, which he made on Groves Lumber Company in Dallas. The focus of the Government's assertion is a conversation Mr. Nicely had with the manager of Groves Lumber—a Mr. Tinsley. This offering of proof was aptly characterized by the trial judge as something "less than earthshaking."

In reality, Mr. Tinsley confirmed the substance of the conversation as it was reflected in sworn testimony Mr. Nicely gave in a statement dated August 24, 1964. That statement was given by Mr. Nicely as answers to interrogatories in the Texas Gypsum litigation at a time when the conversation was still fresh in his memory.

> "(d)(i) Mr. Tinsley asked why were all the big gypsum companies jumping on Texas Gypsum. Mr. Nicely replied that he didn't know about that and that National wasn't doing so and didn't meet Texas Gypsum's competition.
>
> "(ii) Mr. Tinsley asked why competitive manufacturers should fight Texas Gypsum and Mr. Nicely replied that he supposed that unless other manufacturers were so competitive, Texas Gypsum might enlarge and expand at the expense of lost business to other manufacturers. Mr. Nicely inquired why Texas Gypsum deserved to take away any of National's business and explained that dealing with National gave the dealer advantages not present in dealing with Texas Gypsum, including a supply of a number of building products not made by Texas Gypsum, a fine Research Department and promotional advertising of gypsum products.

"(iii) Mr. Nicely gave his opinion stating that he supposed that the price decrease by USG indicated its intention not to surrender any customer or market area to Texas Gypsum lest Texas Gypsum enlarge and expand at the expense of further lost business to USG.

"(iv) Mr. Tinsley said National's former salesman was thin-skinned because after he saw a Texas Gypsum truck at Groves Lumber, he hadn't called on Groves Lumber again and that only Texas Gypsum salesman had called recently." (DX (Nicely)-1, App. 2587ex).

Mr. Tinsley admitted that the above provided an accurate version of the conversation, but that he remembered also the use of three words—"policy of containment." The following colloquy occurred during Mr. Tinsley's cross-examination:

"Q. In what I read to you, can you find any inaccuracies? Is the rest—in other words—

"A. What we have here was definitely, and it is very true of our conversation. In other words, what I see here is fine. This was our conversation, yes, but we seem to be leaving out a little bit.

"Q. The three words ['policy of containment'] you have mentioned?

"A. Yes." (I-A. 283-84).

Any "policy of containment" remark would have been totally inconsequential and would have to have been made in the context of paragraphs (d)(ii) and (iii), above. It and Mr. Nicely's sworn testimony make clear that he was merely giving his opinion on the reason why USG, a competitor of both National and Texas, would not willingly surrender business to Texas

Gypsum. It certainly could not have involved any conspiracy including Mr. Nicely or National Gypsum because, as paragraph (d)(i) of the exhibit shows, National was not even meeting the competition of Texas Gypsum at the time.

There was no evidence to refute Mr. Nicely's sworn testimony that he never discussed his call on Groves Lumber Company with any competitor, before or after the event. His testimony is uncontested that when he went to Dallas he had no plans to call on that customer and had no knowledge that Texas Gypsum Company was selling in the area. When the Tinsley incident is reduced to its essentials, it is nothing more than one of several visits by Mr. Nicely, then a Central Division Sales Manager—Eastern Area, seeking to regain a lost National account.[10] Its receipt as evidence was error, as was its retention, since it proves no part of the alleged conspiracy. (III-A. 1512-1515).

This unremarkable, one-of-a-kind incident, no matter what the interpretation given, is unconnected to anything that occurred after December 27, 1968, the date the statute of limitations began to run. More importantly, however, the Government has never demonstrated any link whatsoever between this remote event and the so-called nationwide price-fixing conspiracy alleged in the indictment.

The only other mention of Mr. Nicely in the Government's Brief concerns his testimony on his knowledge

[10] It is important to note that Mr. Claude Huckleberry, founder of Texas Gypsum Company, who testified extensively in the trial, never mentioned J. P. Nicely as having been involved in the conspiracy he claimed existed. Not only did he not raise Mr. Nicely's name, but neither did the prosecutor when questioning him.

of the the 1965 price increase when National independently decided to follow USG's lead. Mr. Nicely's understanding that National took the 1965 action without prior knowledge of USG's plans stands unrefuted in the record. What the evidence shows is that his involvement in the 1965 price increase was on an after-the-fact basis aiding in the preparation of National's own announcement on the direct orders of his company's President, Mr. Manske, who prepared the first draft of the announcement. (III-A. 1561-63). The government never offered any evidence that Mr. Nicely engaged in price-fixing discussions leading to this price increase or any other.

Of course, as discussed above, this price increase was followed by National's reduction in prices in 1967. This reduction was an independent action by National. No evidence was ever offered that other Gypsum manufacturers had advance word of it or participated in a conspiracy to give it effect. If there were a conspiracy, and quite clearly Mr. Nicely did not know of one, this decrease in prices terminated it about eighteen months prior to the statutory period.

Significantly, there never has been any serious attempt to link Mr. Nicely with price verification, the supposed cornerstone of the alleged conspiracy. Whatever might be the legal implications of price verification, there is absolutely nothing in the record to connect him with a conspiracy relating to the practice.

Mr. Nicely testified without contradiction that he had no direct participation in verification calls to competitors or ever received such calls. He testified further that he never gave instructions to anyone else

with regard to verification of prices with competitors and never asked any employees of National to make a verification call. (II-A. 1519, 1929-30).

This testimony was not a self-serving protest of innocence. Rather it is the only evidence in the record regarding the subject. More importantly, Mr. Nicely's sole initiative taken relating to verification was his suggestion to Mr. Atwell of the company's Sales Department that verification should be reconsidered after he read newspaper accounts in January 1969 of this Court's decision in the *Container* case.

It was for the reason that there was not even disputed evidence concerning Mr. Nicely's participation in a conspiracy during the statutory period that he sought from the Court of Appeals only an acquittal based on lack of evidence. He did not seek the alternative relief of a new trial. Instead, he based his appeal on the single compelling fact that the record was devoid of evidence against him and that he was mistakenly indicted.[11] The Court of Appeals failed to act on his request and remanded him too for retrial.

Thus, Respondent Nicely requests that when this Court determines what action it will order for the disposition of this case, it either separate him from the case or order his acquittal.

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[11] Perhaps it was this utter absence of evidence that had the jury deadlocked. The note sent to the trial judge by the jury foreman on July 13, 1975, after six days of deliberation, has haunting implications. The note, which the Government represents (at p. 61 of its Brief) as stating that "it (jury) was unable to reach a verdict," actually read:

> "We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors." (IV-A. 1835).

CONCLUSION

For the reasons stated in Section I of the Argument, the retroactive application of a changed rule of law violates Due Process and fundamental fairness. For the reasons stated in Section II of the Argument, this Court should, as to J. P. Nicely, take such action as is necessary to prevent a retrial which would violate the Double Jeopardy Clause of the Fifth Amendment. As to both J. P. Nicely and Colon Brown, the Court should rule that there is no evidence sufficient to warrant a retrial on the conspiracy charged.

Respectfully submitted,

CLARK M. CLIFFORD
CARSON M. GLASS
THOMAS RICHARD SPRADLIN
BARRY J. ISRAEL
CLIFFORD, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
(202) 298-8686

Counsel for:

COLON BROWN AND J. P. NICELY

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